

STATE OF MICHIGAN  
COURT OF APPEALS

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

PHILIP JOHNSON CLARK,

Defendant-Appellant.

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UNPUBLISHED  
February 12, 2004

No. 242156  
St. Joseph Circuit Court  
LC No. 01-010864-FC

Before: Murray, P.J., and Murphy and Markey, JJ.

PER CURIAM.

Defendant appeals by right his conviction by a jury of two counts of first-degree criminal sexual conduct, MCL 750.520b(1)(a). The trial court sentenced him to two concurrent terms of 12 to 30 years in prison. We affirm.

Defendant first contends that the prosecution presented insufficient evidence to sustain his convictions. Prosecutors must introduce evidence sufficient to justify a rational trier of fact in concluding that all of the essential elements of the crime were proved beyond a reasonable doubt. *People v Johnson*, 460 Mich 720, 723; 597 NW2d 73 (1999). When reviewing the sufficiency, the court examines the evidence in the light most favorable to the prosecution. *People v Terry*, 224 Mich App 447, 452; 569 NW2d 641 (1997). Under MCL 750.520b(1)(a), "[a] person is guilty of criminal sexual conduct in the first degree if he or she engages in sexual penetration with another person" who "is under thirteen years of age."

MCL 750.520a(o) defines sexual penetration as "sexual intercourse, cunnilingus, fellatio, anal intercourse, or any other intrusion, however slight, of any part of a person's body or of any object into the genital or anal openings of another person's body." This Court clarified the definition in *People v Harris*, 158 Mich App 463, 469; 404 NW2d 779 (1987). Cunnilingus constitutes the act of "placing the mouth of a person upon the external genital organs of the female which lie between the labia, or the labia itself, or the mons pubes . . . ." *Id.* at 470. This act "in and of itself is a sexual penetration." *Id.*

In the instant case, defendant does not dispute that the victims were less than thirteen years old at the time of the offenses. But he asserts that no evidence was presented on the element of penetration. We disagree. Both victims testified that defendant licked their vaginas. This constitutes cunnilingus, part of the statutory definition of sexual penetration. Viewed in the light most favorable to the prosecution this evidence is sufficient to establish the essential

elements of first-degree criminal sexual conduct. A rational jury could have found that the prosecution proved all elements of the crime beyond a reasonable doubt.

Defendant next argues that he is entitled to a new trial because the trial judge improperly instructed the jury on the element of penetration. Defendant failed to object to the instructions at trial. Therefore, the issue is unpreserved and thus forfeited unless it is apparent that a plain error occurred, and defendant can show that the error affected his substantial rights. *People v Carines*, 460 Mich 750, 767, 774; 597 NW2d 130 (1999).

Jury instructions are reviewed in their entirety to determine if there is error requiring reversal and “must include all elements of the charged offense.” *People v Daniel*, 207 Mich App 47, 53; 523 NW2d 830 (1994). But no error exists, even if the instructions are imperfect, if they fairly present the issues to be tried and sufficiently protect the defendant’s rights. *Id.*

Defendant contends that the following instructions on the elements of first degree CSC omitted the element of sexual penetration and constitute a plain error:

First that the defendant engaged in a sexual act that involved the touching of the defendant’s tongue against the genital organ’s [sic] of the complainant. And second, that the complainant was less than the age of thirteen years at the time of the alleged act.

We find that the jury instructions contain no plain error. Additional instructions concerning penetration were unnecessary. At the outset of the trial, the judge explained that penetration is an element of the crime and that in this case the act of penetration in issue was cunnilingus. Members of the jury requested that he provide a clearer explanation. The judge responded by stating that the jury could find defendant guilty if it believed he had touched the victims’ genitals with his tongue. This description comports with the definition of cunnilingus as defined in *Harris, supra* at 470. And cunnilingus is statutorily defined as sexual penetration. Rather than omit the element from the jury instructions, the trial judge provided a definition tailored to the allegations of the case. The instructions fairly presented the issue of penetration and sufficiently protected the defendant’s rights. *Daniel, supra* at 53. Defendant has not shown that plain error affected his substantial rights.

We affirm.

/s/ Christopher M. Murray  
/s/ William B. Murphy  
/s/ Jane E. Markey